United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
MICHAEL C. DEVINE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7239

THE ANDERSON COMPANY and ALICE SCRANTON EASTMAN ANDERSON,

Plaintiffs-Appellants,

B

-against-

P/S

JOHN P. CHASE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

SCHWENKE & DEVINE
Attorneys for Plaintiffs-Appellants
Office and Post Office Address
230 Park Avenue
New York, New York 10017
Telephone: (212) 725-5360

MICHAEL C. DEVINE
Of Counsel

1

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Cases.

B. Statutes; Rules; Regulations

C. Treatises; articles; legislative documents.

STATEMENT OF ISSUES
PRESENTED FOR REVIEW

I. Main appeal.

A. Whether the district court erred in holding that plaintiffs had waived their right to receive investment supervisory services from defendant.

B. Whether the district court erred in excluding evidence of defendant's non-disclosure of possible conflict between its mutual fund transactions and plaintiffs' transactions.

II. Collateral appeal.

Whether the district court erred in denying plaintiffs' post-trial motion for a limited rehearing.

STATEMENT OF THE CASE

A. Nature of the case. This is a private action for damages under the Investment Advisers Act of 1940 (15 U.S.C. §80b-1, *et seq.*) (the "Act").* Defendant John P. Chase, Inc. ("Chase Inc.") is an "investment counsellor" registered under the Act. (20a-21a; 484a-490a). Between November 1, 1966 and February 5, 1971, plaintiffs were clients of Chase Inc. Plaintiffs assert claims for breach of fiduciary duties (under the Act and at common law), breach of contract, fraud under the Act, and common-law negligence.

B. The course of proceedings. This action was tried in the United States District Court for the Southern District of New York, to Honorable Milton Pollack, sitting without a jury.

C. Disposition in the court below. The district court dismissed all counts of the complaint, and judgment was entered accordingly. (651a). Subsequent to entry of judgment plaintiffs moved for a rehearing for the limited purpose of adding to the trial record a portion of a pre-trial deposition of an employee of defendant. (653a-679a). The district court denied the motion. (684a). Plaintiffs appeal from the judgment and from the denial of the motion for a rehearing. (652a; 685a). The appeals have been

---

* Relevant portions of the Act are set forth in Exhibit A to this brief.

consolidated.

D. Statement of the facts. Plaintiff Alice S.E. Anderson ("Mrs. Anderson") is 69 years old. In early 1965 she gave her son, Douglas S.H. Anderson ("Mr. Anderson"), a general power of attorney which has been in effect continuously from that time. (TT18).*

Plaintiff The Anderson Company ("Anderson Co.") is a Massachusetts limited partnership. During the period from September, 1966, through April 14, 1967, Mr. Anderson and Mrs. Anderson were the general partners of Anderson Co. Continuously from April 14, 1967, Mr. Anderson has been the sole general partner, and Mrs. Anderson has been a limited partner. From April 30, 1970, to the present, Elizabeth Anderson (Mr. Anderson's wife) also has been a limited partner. (18a-19a).

In September, 1966, Mr. Anderson made the investment decisions for Mrs. Anderson and for Anderson Co. (33a). At that time, believing that information critical to superior investment results flowed most quickly and most consistently to organizations managing large investment reservoirs, Mr. Anderson considered retention of an investment counsellor

---

* References to portions of the trial transcript not included in the appendix are noted "TT". References to exhibits not included in the appendix are noted "Pl. Exh." or "Def. Exh.".

to supervise and manage the cash and securities of Mrs. Anderson and Anderson Co. (the cash and securities are hereinafter referred to collectively as the "Accounts"). Mr. Anderson knew of the Chase group of mutual funds, a large investment reservoir, which was managed by Chase Inc. (45a-48a). Also having known John P. Chase, the founder and senior officer of Chase Inc., Mr. Anderson called on him in September, 1966. (36a; 48a). Mr. Anderson described the Accounts and explained his desire to obtain for the Accounts, through a counselling relationship, the benefit of the flow of information which was available to Chase Inc., primarily due to its management of the Chase group of mutual funds. (178a-179a). Mr. Chase explained the Chase Inc. counselling procedures, the interrelationship between the counselling of private accounts and the management of the mutual funds, and the basic formula (involving price-earnings ratios and growth rates) employed by Chase Inc. in its security selections. (This formula is discussed in more detail below.) Although Mr. Chase stated that Chase Inc. would not counsel an account having a market value of less than $500,000, he agreed to treat the Anderson Accounts (and an Anderson testamentary trust account not directly involved in this action) as a single account for purposes of satisfying the minimum size requirement. (179a-186a). At this meeting Mr. Chase gave Mr. Anderson a

brochure describing Chase Inc. and its services. (26a; 51a; 180a-181a; 366a-376a).

After reading the brochure, Mr. Anderson wrote to Mr. Chase on October 5, 1966, stating his desire to proceed further with Chase Inc., outlining his "preliminary thinking" regarding the objectives of the Accounts, and enclosing lists of plaintiffs' securities. (377a-382a). According to these documents the Accounts (including the trust account) had a total market value of $261,000, but Anderson Co. had non-marketable assets which could act as collateral for private borrowings of approximately $225,000, which would bring the Accounts to a level near the required minimum. On October 6, 1966, Mr. Chase wrote to Mr. Anderson, enclosing a proposed supervisory agreement which Mr. Chase had pre-signed. (26a; 383a-385a). The proposed agreement indicated Chase Inc.'s willingness to accept counselling responsibility for the Accounts. On November 14, 1966, in reliance upon his conversation with Mr. Chase and the Chase Inc. brochure, Mr. Anderson signed and returned the letter agreement. (26a; 55a-57a; 385a-386a).

At that time (November 14, 1966) the Accounts did not total $500,000 as Anderson Co. had not made the borrowings which Mr. Anderson and Mr. Chase had discussed. However, Mr. Anderson's efforts to effect the borrowings in order to meet the minimum account requirement were

known to Chase Inc. becau the Anderson Co. borrowing proposal had been submitted to Mr. Chase. (28a; 387a-420a).

Chase Inc. commenced analysis of the Accounts sometime after October 5, 1966. An initial internal appraisal of the Accounts was prepared as of October 6, 1966. The first recommendations for the purchase and sale of securities were made on December 1, 1966. (421a-426a).

In the period from December 1, 1966, through April, 1967, Herbert Bancroft and Mr. Chase actively attempted to supervise the Accounts. During that period recommendations were made by telephone and immediately confirmed by written forms which stated the name of the issuer of the security to which the recommendation related, the number of shares or principal amount, the limit buy or sell price, and initially the tax effect of recommended sales. (29a; 421a-426a). At Chase Inc. these forms were to be used whenever Chase Inc. made a recommendation. When a sell recommendation was made, an offsetting recommendation counselling a use of proceeds also was made; and correspondingly, when a buy recommendation was made, an offsetting potential source of funds was specified. Plaintiffs' indebtedness was considered with respect to security purchase and sale recommendations, and the Accounts were counselled to reduce bank debt when Chase Inc. felt it to be appropriate.

In April - May, 1967, Anderson Co. and Mrs. Anderson made major borrowings. Approximately $180,000 was added to the Accounts. (464a).

In April, 1967, Richard Spindler replaced Herbert Bancroft as primary supervisor on the Accounts (29a), and thereafter the manner of counselling the Accounts began to deteriorate. Mr. Chase no longer reflected active interest. Written recommendations were not made consistently, and tax considerations were overlooked. Chase Inc.'s initiative diminished. In the changing conditions of a declining market in late 1967 Chase Inc. generally did not make sell recommendations despite the highly leveraged position of the Accounts and the substantial reductions in Chase Inc.'s estimates of earnings for issuers whose securities the Accounts held. (80a-82a; Pl.Exhs. 49, 50).

For these reasons, in December, 1967, Mr. Anderson terminated the counselling contract between Chase Inc. and Anderson Co. The counselling relationship between Chase Inc. and Mrs. Anderson remained in effect. (85a-87a; 435a).

In June, 1968, Mr. Spindler informed Mr. Anderson that if the Anderson Co. account were returned to Chase Inc. every effort would be made to keep the Accounts current with changing conditions and with Chase Inc.'s changing interests in industries and stocks. Also, early in 1968 Chase Inc. had raised its minimum annual fee from $1000 to $2500.

The combination of these factors caused Mr. Anderson to return the Anderson Co. account to Chase Inc. as of June 6, 1968. (89a-91a; 437a-438a).

Although the Anderson Co. holdings in July, 1968, were substantially different from the holdings in December, 1967, Chase Inc. did not prepare an initial internal appraisal of the account. (441a). Nor did it prepare any recommendation program. (92a-94a; 97a-98a). Mr. Chase and Chase Inc.'s brochure had represented that it was standard operating procedure to prepare an initial appraisal and to submit a program of recommendations. (366a-376a).

The absence of a recommendation program at that time was particularly damaging because most of the securities in the Anderson Co. account were not included on Chase Inc.'s internal approved lists or were "unacceptable" when evaluated by Chase Inc.'s "basic formula"; namely:

> My first investment criteria, therefore, is that one should concentrate on stocks with a minimum growth rate of 15%. My second criteria is to limit one's purchases to stocks whose times earnings multiples do not exceed their estimated rate of earnings growth. If one sticks to this basic formula, it greatly reduces the risk factor... Only by this combination of earnings growth and increased times earnings multiple can you expect to get really superior investment results. (530a-531a).

In December, 1968, Henderson Inches replaced Mr. Spindler as primary supervisor for the Accounts. There was no back-up, or secondary, supervisor. (TT342-343). At or before the time that Mr. Inches assumed responsibility Chase Inc. made a conscious, unilateral decision to reduce drastically the attention to be given the Accounts, and thereby effectively terminated supervision. No purchase or sale recommendations were to be initiated. No written recommendation or confirmation forms were to be made or sent (indeed, none had been sent since early 1968). No programs of offsetting ("matched") purchases and sales were to be prepared. No consideration was to be given to tax factors. No initiative was to be taken in obtaining information about the financial affairs, needs, and obligations of Mrs. Anderson or Anderson Co. Chase Inc.'s posture was to be responsive only; that is, if Mr. Anderson made an inquiry about a security Mr. Inches was to give his impressions, but nothing more. (100a-102a; 210a-216a).

Mr. Anderson did not understand, know of, or consent to, this change. He accepted Mr. Inches' comments as recommendations. (100a-105a). In March, 1969, shortly after the undisclosed change in its method of dealing with the Accounts, Chase Inc. wrote to Mr. Anderson and falsely stated that there would be no change in the method of handling the Accounts. (453a-454a). Implicitly, the same

misrepresentation was made in several other documents:

(1) Every invoice which Chase Inc. rendered to the Accounts over a period in excess of four years described its services as "investment counsel", a term of art, meaning no less than continuous, personalized supervision based upon a detailed understanding of the needs, obligations, and objectives of the client -- precisely that which Chase Inc. had decided not to render to the Accounts. (TT436).

(2) The Chase Inc. brochure which had been given to Mr. Anderson remained in use. It described Chase Inc.'s services as exclusively "investment counsel". (366a-376a).

(3) Chase Inc.'s official registration form ("ADV") then on file with the SEC stated that Chase Inc. rendered only "investment supervisory services" and did not manage investment accounts under circumstances not involving "investment supervisory services". Nevertheless, it chose not to render such services to the Accounts. (486a; 490a).

With Chase Inc. failing to make specific, written sell recommendations, the Accounts continued to hold (from July, 1968) many securities which were unacceptable in terms of Chase Inc.'s internal, confidential rating lists or its "basic formula". Similarly unacceptable securities were purchased upon the verbal recommendation of Mr. Inches, given in response to Mr. Anderson's inquiries. Unacceptable securities in the Accounts depreciated in 1969, and then dropped

precipitously in the second quarter of 1970. (124a). In April - May, 1970, facing this depreciation in a rapidly declining market situation, and receiving no recommendations from Chase Inc., Mr. Anderson instructed the broker to effect certain short sales, thereby generally hedging the Accounts against further losses. He covered the short positions soon after their institution. Mr. Anderson's purpose in making these sales also was to prompt Chase Inc. to initiate recommendations. (125a-126a; 129a-133a). The need for such recommendations was overwhelming because in June, 1970, approximately 59% of the total market value of the Accounts was in cash ($110,000). (495a; 504a). Chase Inc. chose to ignore the uninvested cash, although its undisclosed outlook recently had become favorable toward equity purchases. (593a-596a).

Following the hedging transactions in and about May, 1970, Chase Inc. still failed to offer any investment program for the cash available in the Accounts. (131a-132a). In the absence of any program for Chase Inc., and in the face of a violently fluctuating market, Mr. Anderson instituted a second round of hedging sales. These sales were consistent with Mr. Anderson's understanding of Mr. Inches' July 7, 1970, letter, which suggested that purchases should be made <u>later</u> at lower, "thoroughly sold out" prices. (Pl. Exh. 30, p. 6). Once again, the hedging and short sales

evoked no meaningful investment program from Chase Inc., and the Accounts therefore carried the short positions for a number of months. (134a-138a).*

As of July 31, 1970, by virtue of plaintiffs' sale of non-marketable assets, the amount of investable cash in the Accounts increased to approximately $250,000. This cash remained available for investment through the period to October 6, 1970, the date of Chase Inc.'s four month appraisal. (496a; 505a). On that date cash represented 82% of the total value of the Accounts. These figures do not include cash which was available in the "short accounts" by reason of the then-existing hedged positions. Had the plaintiffs delivered their long positions to close out the hedged positions additional cash would have been generated, and the percentage of the Accounts in cash available for investment would have been increased substantially.

It was particularly inappropriate for the Accounts to have been in this excessively heavy cash position in view of Chase Inc.'s then bullish market attitude. (Def. Exh. 45).

---

* The short sales were of two types: so-called "naked" short sales (sale of a security not owned by the seller) and short sales "against the box" (or "hedge" sales) (sale in a short brokerage account of a security owned by the seller). Almost all of the short sales in the Accounts were "against the box".

Mr. Anderson was unaware of Chase Inc.'s bullish attitude. He made short sales against the box because in the absence of counselling from Chase Inc. he was in a state of extreme uncertainty and felt it better to avoid market risk.* Mr. Anderson wrote Mr. Chase on October 2, 1970, and asked for his judgment on existing long and short securities positions. (474a). There was no direct response. Some four weeks later Mr. Inches wrote to Mr. Anderson and suggested that all positions be held. (476a). However, two weeks after that Mr. Chase wrote to Mr. Anderson and suggested that the Accounts "cover" all short positions, meaning that the Accounts should enter the market and purchase securities to offset the short positions. (482a). In true effect, this was a recommendation for the Accounts to repurchase those very securities which it held "short against the box", because in covering the short position (by purchasing in the market) the previously hedged long position would be relieved of the hedge and reinstated as a normal long investment. Of the ten securities which Mr. Chase thus recommended be purchased only one was acceptable when measured by Chase Inc.'s own internal approved lists. (252a-262a).

Chase Inc.'s failure to properly supervise the

---

* A short sale against the box effectively neutralizes a security position because any subsequent gain in the market price is offset by a loss on the short position, and any decrease in market price is offset by a gain on the short position.

short positions was in part due to inadequate record-keeping. For instance, the short sales against the box were reported as long positions on the October, 1970, appraisal. Naked short positions were not reported at all. (505a). As a result of its inaccurate records Chase Inc. did not have a true picture of the Accounts from approximately June, 1970, through February, 1971. This ignorance of the true state of the Accounts is demonstrated strikingly by Mr. Inches' appraisal letter of November 6, 1970, which discusses hedged securities as if they were "long", that is, owned and unsold. (475a-477a). Mr. Anderson pointed this out on November 11, 1970 (Pl.Exh. 36), but Mr. Inches' only response was to send Mr. Anderson some Chase Inc. worksheets to review and correct.* (Pl.Exh. 34; 49a).

Chase Inc.'s continuing failure to provide a program for use of the Accounts' large amounts of cash and its failure to supervise the Accounts led Mr. Anderson to terminate the counselling agreement in February, 1971. (483a).

E. Summary of argument.

(1) Main appeal. The district court erred in

---

* It was more than ten weeks before Mr. Inches provided a statement of the hedged and short positions as of October 6, 1970. (Pl.Exh. 38).

several of its findings and conclusions, and in one significant evidentiary ruling. However, the specific errors are, for the most part, simply outcroppings of two underlying errors involving the policy, purposes, and meaning of the Investment Advisers Act.

Determination of this appeal requires primarily recognition of the announced intention of the Act -- to assure that the duty and responsibility of investment advisers (and particularly "investment counsellors") to their clients is measured by the highest fiduciary standard.

The two-fold error of the district court stems from employment of an excessively lenient standard in judging defendant's responsibility. First, the court placed the duty of initiation on the clients; and second, it emasculated the meaning of "investment supervisory services". Nevertheless, the district court held that in the management of the Anderson Accounts defendant failed to render "investment supervisory services". Defendant excused and defended those failures by saying "Anderson should have done it," and the district court accepted the defense, erroneously.

(2) <u>Collateral appeal</u>. In preparing the appendix on appeal plaintiffs' counsel first realized

that they had not offered at trial a highly relevant segment of a pre-trial deposition. Therefore a motion was made for leave to add this deposition segment to the trial record. The motion was denied. Point IV of this brief deals with the appeal from that order.

POINT I

A PRIMARY PURPOSE OF THE INVESTMENT ADVISERS ACT IS TO ASSURE THAT INVESTMENT COUNSELLORS RENDER SERVICE IN A MANNER CONSISTENT WITH THE HIGHEST FIDUCIARY DUTY

The Act distinguishes between "investment advisers" and "investment counsel", the latter being a subclass of the former. "Advisers" are persons who, for compensation, engage in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issue or promulgate analyses or reports concerning securities. Act, §202(11); 15 U.S.C. §80b-2(11)(1940). "Investment counsel" are advisers who represent that a substantial part of their business consists of rendering "investment supervisory services". Act, §208(c); 15 U.S.C. §80b-8(c)(1940).

Thus "investment counsel" is a term which an adviser may use if he wishes to inform the public, and his clientele, that he provides services which with regard to continuity and individualization are superior to those of advisers generally. The Act refers to such services as "investment supervisory services".

> . . . the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client. (Act, §202(a)(13); 15 U.S.C. §80b-2(13)(1940)).

However, along with the elite status which an adviser obtains by adopting the "investment counsel" title goes responsibility -- the highest fiduciary responsibilities.

The investment counselling industry sought this fiduciary responsibility. During the Senate hearings considering the Act, members of the industry expressed concern about a segment of their industry which they considered "tipsters" and "touts", but called themselves "investment counsel". Investment counsellors considered themselves professionals who furnished clients personalized, competent, unbiased and continuous advice regarding the sound management of their investments. It was to foster the development of a professional relationship between investment counsellors and their clients (i.e., a personal, responsible relationship) that the concept of "investment counsel" became the primary focus of the Act.*

---

* H.R. Doc. No. 477, 76th Cong., 2d Sess. (1939); S. Rep. No. 1775, 76th Cong., 3rd Sess. (1940); Hearings on H.R. 10065, Before a Subcommittee of the House Comm. on Interstate and Foreign Commerce, 76th Cong., 3rd Sess. 28 (1940). See also Loomis, The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940, 28 Geo. Wash. L. Rev. 214, 248-249 (1959).

"It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail" in every facet of the securities industry. Silver v. New York Stock Exchange, 373 U.S. 341, 366.

* * *

These canons [of an investment counsel association] were adopted "to the end that the quality of services to be rendered by investment counselors may measure up to the high standards which the public has a right to expect and to demand."

* * *

The Investment Advisors Act of 1940 thus reflects a congressional recognition "of the delicate fiduciary nature of an investment advisory relationship", as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest . . . SEC v. Capital Gains Bureau, 375 U.S. 180, 186-187, 189, 191 (1963).

The applicable standard of care was articulated by Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464 (1928):

Many forms of conduct permissible in a workaday world for those acting at arms length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the

> rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. [citation omitted] Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

See also, Rosenfeld v. Black, 445 F.2d 1337, 1342-43 (2d Cir. 1971), cert. dismissed 409 U.S. 802; SEC v. Chenery Corp., 318 U.S. 80 (1943).

The Supreme Court directed, in Capital Gains, that the Act:

> . . . be construed like other securities legislation "enacted for the purpose of avoiding frauds," not technically and restrictively, but flexibly to effectuate its remedial purposes. (p. 195).

In Capital Gains the Supreme Court was confronted with the practice of "scalping", wherein the investment adviser trades on the market effect of his own recommendations without disclosure to his clients. After stating that a purpose of the Act is to prevent investment advisers from conducting their business so as to defraud or mislead investors (p. 189), the Court elaborated on the adviser's duty.

> Nor is it necessary in a suit against a fiduciary, which Congress recognized the investment adviser to be, to establish all the elements required in a suit against a party to an arm's-length transaction. Courts have imposed on a fiduciary an affirmative duty of "utmost good faith, and full and fair disclosure of all material facts," as

well as an affirmative obligation "to employ reasonable care to avoid misleading" his clients. There has also been a growing recognition by common law courts that the doctrines of fraud and deceit which developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue. (p. 194).

Thus the Act imposes the highest fiduciary duty upon investment counsellors. Dereliction of that duty constitutes a violation of the Act.

In addition, misrepresentations and non-disclosures* by investment counsellors can constitute fraud within the meaning of the Act. Misrepresentations may be express or implied.**

---

* In his dissenting opinion in Capital Gains Justice Harlan recognized that the majority opinion stands for the proposition that any non-disclosure of a material fact to recipients of investment advice constitutes fraud or deceit under the Act. (p. 207, n.4).

** The so-called "shingle theory" emanated from unfair securities pricing cases arising under the Securities Exchange Act of 1934, and provides that a broker-dealer, upon whom customers repose trust and confidence, impliedly represents, by hanging out his shingle, that he will deal fairly with them. See In re Duker & Duker, 6 SEC 386 (1939); Charles Hughes & Co. v. SEC, 139 F.2d 434 (2d Cir. 1943), cert. denied, 321 U.S. 786; 3 Loss, Securities Regulation 1482 et seq. (2d ed. 1961).

In the instant case defendant falsely represented that it would provide continuing investment supervisory services, and it failed to disclose a cognate material fact; namely, its decision to cease all attempts to provide continuing investment supervisory services. The latter was particularly material in light of defendant's express representations that such services were being, and would be, provided.

POINT II

DEFENDANT VIOLATED THE FIDUCIARY DUTY IT OWED TO PLAINTIFFS

A. Defendant's duty to plaintiffs. Defendant was plaintiffs' investment counsellor. It was under a duty of the utmost good faith, loyalty, and diligence. That duty sprung from the contract between the parties, from common law fiduciary obligations, and from the Investment Advisers Act, as discussed in the preceding point.

Neither the existence nor the sources of the duty are in issue here. However, its scope is.

Defendant did two things which plaintiffs contend breached the duty. First, it abdicated the initiative to its clients (plaintiffs) and assumed a passive role. Second, it failed to render "investment supervisory services".

B. Abdication of the initiative. To carry out its function properly an investment counsellor must act affirmatively, and upon its own initiative, in three areas. It must obtain and continuously update all information, personal and financial, which may be relevant to its client's investment needs. From such information it must aid the client in defining, and continuously reexamining, the investment objectives. Finally, it must make purchase

and sale recommendations in pursuit of the investment objectives.

In the instant case defendant did not perform any of these three functions, and in essence, the district court so found. Defendant expected the plaintiffs to decide what personal and financial information was relevant and then to submit it. It adopted plaintiffs' "preliminary thinking" in 1966 as the investment objectives of the Accounts, without scrutiny and without subsequent reexamination during the next four years. In late 1968 it stopped making purchase and sale recommendations and simply made itself available to comment on plaintiffs' inquiries regarding possible transactions.

Thus defendant adopted a passive, merely responsive, role in flagrant contravention of its duty to plaintiffs. In defense of this action, after termination of the counselling relationship, defendant has claimed that plaintiffs consented to defendant's assumption of a passive role. As discussed below, such consent, even if given, legally would be ineffective. However, no such consent was given. Throughout the full period of the counselling relationship (1966-1971) defendant continued to represent to plaintiffs that it was rendering "investment counsel" services, evidenced by the following:

(1) In September, 1966, in his meeting with Mr. Anderson, Mr. Chase described the supervisory services which defendant would render if it became the investment counsellor for the Accounts. (45a-47a).

(2) The brochure which defendant gave to Mr. Anderson in or about September, 1966, described defendant's services as exclusively those of "investment counsel".

> John P. Chase, Inc. is an internationally known Boston based investment counsel firm. It was incorporated in 1932 under Massachusetts law to carry on the business of investment counsel and as such to advise persons, firms and corporations with respect to investments of all kinds, to prepare reports with respect to investments and to do all things which are necessary or incidental to the conduct of the business of investment counsel.
>
> * * *
>
> It is our policy to restrict our operations to the management of a relatively few large accounts in the belief that clients are served best by rendering service of a highly personal nature tailored to their individual investment needs and objectives. (368a).

(3) The counselling contract stated that supervisory services would be rendered.

> We hereby retain you as investment managers to analyze and supervise the investment accounts...and to advise us concerning any changes in the investments which you may consider expedient with reference to the state of these accounts and to market conditions. (385a).

Not only is use of the word "supervise" significant, but also the latter portion of the sentence emphasized that responsibility for initiation of recommendations resided exclusively with defendant.

It must be remembered that this standard form of Chase Inc. counselling contract was an exhibit to the form ADV which defendant filed with the SEC, in which it stated that its only business was the rendition of "investment supervisory services". (487a).

(4) In every four-monthly invoice rendered by defendant to plaintiffs, over more than four years, it stated that it had rendered "investment counsel" services in the period for which it sought to be paid. (TT436).

(5) In Mr. Spindler's letter of June 26, 1968, he stated that defendant would "try to keep the accounts in current shape as our interest in industries and stocks change", which of course is the primary aspect of investment supervisory services. (438a).

(6) On March 20, 1969, Mr. Chase wrote Mr. Anderson; he referred to the existing contract and stated that "there will be no change in the method of handling your account and we look forward to a continuing relationship with you". This constituted a reaffirmation of earlier representations as to the supervisory services which were to be rendered. (454a).

(7) Even after the counselling agreement had been terminated defendant continued to represent that it had acted as "investment counsel" and had rendered "investment supervisory services". On March 4, 1971, Mr. Inches said "perhaps when the market develops a more normal pattern, you will be interested in obtaining our Counsel Services again". The same letter refers to "your supervised portfolio". (Pl.Exh. 40).

(8) In his pre-trial deposition Mr. Inches admitted several times that between 1968 and 1971 defendant claimed to have rendered investment counselling services to plaintiffs. He made no mention of some lesser form of service having been consented to by plaintiffs.* This testimony demonstrates the recent invention of the "waiver" defense, as does defendant's answer. In paragraph 10 it admits that defendant commenced "counselling" on November 1, 1966. (Note that complaint paragraph 12, to which answer paragraph 10 responds, refers to "advising and counselling", but the answer pointedly denies any "advising".) In paragraph 11 defendant admits that its procedure was to "initiate" purchase and sale recommendations, and most

---

* These are the portions of Mr. Inches' deposition which were omitted from the trial record and which are the subject of the second, consolidated appeal. (Point IV *infra*).

significantly, in paragraph 18 defendant admits it received fees "for counselling services rendered to the accounts from October 1966 through February 1971". (62; 14a-16a).

It was in 1970 that defendant's abdication of the initiative caused plaintiffs' greatest damage. As a result of defendant's failure to make purchase recommendations the Accounts had approximately $250,000 in investable cash in October, 1970.* This represented approximately 82% of the then market value of the Accounts. At this time, and in succeeding months, Mr. Anderson was uncertain as to the trend of the securities markets, and he therefore hedged most of the Accounts' securities positions.** A second reason for the hedging transactions was Mr. Anderson's hope that they would cause defendant to prepare a comprehensive investment program. No such program was forthcoming, and thus Mr. Anderson was forced to make the investment decisions throughout that volatile year with only passive and equivocal participation by defendant.

---

* Excluding the cash available in the short accounts. See Exhibit B to this brief.

** As noted above, the net effect of a hedging short sale is to neutralize risk on the long position and make it the functional equivalent of cash.

On October 31, 1970, the Accounts were approximately 82% in cash, with some 9 naked short positions, 11 hedged long positions, and only 6 unhedged long positions. (Pl.Exhs. 47, 48). Despite this strange posture, defendant did not submit any recommendation program, and in retrospect some of the reasons are plain. Defendant did not have any current information concerning the personal or financial situation of plaintiffs. The objectives of the Accounts had not been considered in over four years. Defendant had lost track of the cash position of the Accounts. It also lost track of the securities positions, as it did not report on or appraise the short positions (neither naked nor hedged). When defendant issued its four-month appraisal dated October 6, 1970, Mr. Anderson immediately informed Mr. Inches of its plain inaccuracy. Defendant's only response was to send Mr. Anderson many pages of work-sheets and request that he review them.

On October 2, 1970, Mr. Anderson had written Mr. Chase and requested that defendant make recommendations. (474a). Some four weeks later Mr. Inches suggested standing pat. (476a). Two weeks after that, the contradictory response, from Mr. Chase, was a suggestion that all short positions be covered. No recommendations were made for use of cash. (482a). In

retrospect it is clear that the suggestion to cover short positions was an ill-considered, negligent act. In recommending that the Accounts cover their hedged positions defendant was recommending the purchase of ten securities, nine of which were unacceptable by defendant's own standards. Mr. Anderson continued to flounder. Realizing, early in 1971, that defendant had abdicated completely its supervisory function plaintiffs terminated the contract.

The truth is not that plaintiffs consented to insufficient counselling, but rather that Mr. Inches and Mr. Spindler found the Accounts too difficult to counsel. They did not have absolute discretion, and Mr. Anderson often raised questions and passed on ideas which came from other sources, increasing the number of factors in any investment decision. But difficulty is not an excuse for abdication of initiative, which was the course followed by Messrs. Spindler and Inches. Defendant was obliged to terminate the counselling relationship if it could not perform. It could not stand idly by, lose hold, and continue to invoice at increased rates for "investment counsel" services.

> It is not enough that one who acts as an admitted fiduciary proclaim that he or she stands ever ready to divulge material facts to the ones whose interests she is being paid to protect. Hughes v. SEC, 174 F.2d 969, 976 (D.C. Cir. 1949).

In sum, the Accounts may not have been easy to supervise. They were highly leveraged and during 1970 they engaged in short-selling. Defendant lacked expertise and experience in both areas, and thus was obliged either to obtain the necessary expertise or to terminate the counselling relationship. Unfairly, and unlawfully, it chose to do neither; it chose to continue the relationship and secretly disregard the leveraging and short-selling.

The evidence of this disregard is clear. First, defendant did not have accurate records of the short sales and resulting short positions. The October 6, 1970, four-month appraisal prepared by defendant did not even record short positions, much less mark them to the market. "Marking to the market" is a procedure for valuing short (and margin) positions -- the total price of the short sale is subtracted from the current price of the same amount of securities, the result being the net positive or negative value of the short position. This procedure is essential to proper counselling not only for the obvious reason that the advisability of holding a position may depend on its value, but also because the amount of the client's investable cash cannot be determined without knowing whether net cash will be needed to cover short positions.

Second, whenever defendant commented on the short positions it gave the same blanket recommendation, namely

to cover all short positions by purchasing the securities which the Accounts were short. The plain purpose of these recommendations was to ease defendant's counselling difficulties. No thought was given to the investment or tax significance. As described above, the effect of covering the Accounts' ten hedged positions in November, 1970, would have been the purchase of nine securities which were unacceptable by defendant's own internal standards.

Third, at trial Mr. Chase admitted defendant's disregard of the short positions. This testimony, which is generally indicative of defendant's attitude toward plaintiffs, concerns the letter in which defendant advised the Accounts to cover all short positions.

> Q. With respect to the short sale against the box, what is it you expected Mr. Anderson to do, if he followed your letter?
>
> A. He had a choice whether he bought it in or whether he delivered the stock that he had in the box.
>
> Q. Did you mean by your letter to suggest which of the two alternatives was appropriate for him at that time?
>
> A. No.
>
> Q. When I say "him", I mean for the Anderson Company account.
>
> A. No. He got the account in that shape and I was telling him to get it out. He didn't ask me how to get there and I didn't see why I should tell him which was the better way for him to extract himself from that situation. (253a).

Defendant appears to claim that it had a right to, and did, counsel only a portion of the Accounts; namely, the unhedged long positions. (251a-252a). Conversely, it failed and refused to supervise the naked short positions, the hedged positions and the uninvested cash. Thus during the critical days in the second half of 1970 defendant admittedly supervised less than 10% of the Accounts, because there were very few unhedged long positions (e.g., on November 29, 1970, there were only 4 unhedged long positions; Pl. Exhs. 47, 48). Mr. Chase's testimony, which is rich with statements like that quoted above, keynotes plaintiffs' claim, for it evinces, with respect to the Accounts, an antagonistic disinterest and disregard, which Mr. Chase developed not later than December, 1968. The overriding issue before this court is whether such an attitude, and the supervisory inattention spawned by that attitude, are consistent with the rendition of investment supervisory services and faithful performance of a high fiduciary duty. An investment counsellor does not satisfy its statutory and contractual duties when it refuses to consider 90-plus percent of the client's investable assets and fails to disclose this self-imposed limitation, leading the client to believe that all assets and positions are under supervision.

The damage which resulted from defendant's refusal

to supervise the short positions was due not only to its disregard of those positions themselves, but also to the distorted view of the long positions which it had by virtue of its refusal to accept the existence of offsetting short positions. It of course is not possible to counsel a client properly as to his best course of action respecting a long position while refusing to recognize that that position already has been sold. Mr. Chase admitted the necessity of correctly valuing short and hedged positions. He said that it was not possible to make recommendations for use of the cash in the Accounts because defendant did not know whether cash was needed to carry, close, or cover the short positions. (250a). As a result the cash lay unsupervised.

C. Failure to render investment supervisory services. Of course initiative is essential to "investment supervisory services", and therefore defendant's abdication of the initiative was part of its failure to render such services. However, the failure runs much deeper -- defendant's internal systems, procedures, and policies, in important respects, were deficient and were not adhered to in serving plaintiffs' Accounts.

As the ensuing discussion indicates, the district court correctly found that defendant had not rendered investment supervisory services to plaintiffs. However, the court further held that there was no liability because plaintiffs

had waived their right to such services. The latter holding was erroneous.

(1) Defendant had no procedure for initially obtaining information about plaintiffs -- their financial posture, needs, obligations, and objectives -- nor for periodically checking and updating the information, had it been obtained. (192a-205a). Mr. Anderson took the initiative in submitting certain portions of the relevant information from time to time. However, defendant did not analyze the submitted material or seek to have it supplemented with additional information which was essential to satisfactory performance of a truly supervisory service. Plaintiffs never refused to submit information. They were never asked. (28a-29a; 62a; 110a-114a; 187a; 278a; 356a).

At trial Mr. Chase openly admitted defendant's total disregard of the financial needs and obligations of the clients. He gave the following testimony concerning the source of the funds which were added to the Accounts in 1967:

> Q. Is it true there were essentially three sources of the additional funds which were required to bring the accounts up to the Chase, Incorporated minimum?
>
> A. I have heard that statement. <u>It wasn't my business to determine where they were getting the additional money</u>. (emphasis supplied) (197a).*

* Mr. Chase made other similar statements. For instance "Bank borrowings and real estate mortgaging was not a part of our concern". (199a). See also 207a-209a; 241a-242a.

From September, 1966, through February, 1971, defendant did not know, or seek to learn, of Mrs. Anderson's health; income; average living expenses; dependents; the value, liquidity, or nature of her non-marketable assets; the amount, maturity, or collateralization of her debt unrelated to her investment securities; nor the amount, ownership, or cost of her insurance coverage. (70a-80a; 203a-205a). It never asked the amount of her cash available for investment or emergency. (290a-291a). Similarly, defendant either did not know, or did not comprehend, the nature of the Anderson Co. partnership;* the financial posture and needs of its partners (e.g., that one of its major purposes was to provide income for Mrs. Anderson); or the maturity or collateralization of any of Anderson Co.'s obligations. (79a-80a; 356a). Defendant never asked to see the tax returns of either plaintiff. (80a; 87a; 99a; 107a-108a; 110a; 277a-278a; 356a). It did not monitor regularly the amount of Anderson Co.'s investable cash. (290a-291a).

A description of the minimum amount of information which an investment counsellor _must_ have about his client is contained in the SEC's form ADV. Question 18(a) reads:

> Does Applicant or Registrant [Chase Inc.] furnish "Investment supervisory services", defined as the giving of continuous advice to clients as to the investment of funds on the basis of individ-

---

* Mr. Spindler thought Anderson Co. was a corporation. (278a-279a).

> ual needs of each client (distinguish from continuous advice of any nature which is not based on consideration of all relevant factors; e.g., the nature and the amount of other assets, investments and insurance, and the nature and extent of the personal and family obligations of each client)?

Defendant answered "yes". Question 18(b) reads:

> Does Applicant or Registrant [Chase Inc.] manage securities accounts for clients under circumstances not involving "investment supervisory services"?

Defendant answered "no". (486a; 490a).

Defendant fell far short of this minimum standard. It could not represent and promise truthfully that it would provide continuous supervision tailored to the individual needs and objectives of the Accounts when it had no procedure, and made no effort, to learn those needs or to define those objectives professionally.

Here, as in many aspects of this case, defendant tries to fob off its responsibility; it tries to say "that was up to Anderson".

> Q. ...In the five-year period that the accounts were in effect, did you feel it was necessary or appropriate to inquire on a regular basis with respect to the outside debt and borrowing, if any, of Mrs. Anderson?
>
> A. My answer was no. I think we had a right to rely on the one that held the power of attorney [Mr. Anderson] to keep us current after he had made the original statement as to his mother's position. If it changed

> materially, I think it was up to him to advise us and not for us to be boring into our client's accounts repeatedly. (Mr. Chase; 205a).

This is a clever tactic because Mr. Anderson was concerned about the Accounts, and it can be made to appear that he assumed certain responsibilities which defendant now seeks to disown. However, the tactic cannot change the overriding principle -- defendant was the fiduciary, and as such, it bore exclusive responsibility for initiating and following through on matters necessary and proper to its supervisory duties. The most elementary of these matters was the acquisition and current maintenance of all relevant information. No proper supervision was possible without it. The type of information which was needed w s a matter as to which defendant should have had particular expertise, as an investment counsellor. Mr. Anderson could not be expected to know what was, and what was not, relevant; nor could he be expected to initiate compilation and submission of that which was relevant. This duty, the most fundamental of all duties of an investment counsellor, belonged to defendant, and it failed to carry it out; indeed it unilaterally tried to disown the obligation

The district court accepted defendant's argument, even embellished it slightly, holding that plaintiffs had by contract obligated themselves to compile and transmit to defendant all information needed by defendant

in order to carry out its counselling duties.

> Chase, Inc. was entitled to rely on Anderson's contractual obligation to keep Chase, Inc. posted with respect to the affairs of plaintiffs and his investment activities and changes in the Accounts. (625a).

No such contract was made. Certainly the written agreement does not so provide. Defendant's "ADV" filing with the SEC does not state that the burden of submitting relevant information is placed upon the clientele contractually. Nor is there any trial testimony establishing an oral agreement to that effect. The district court's finding of a "contract" is erroneous.

Defendant's failure to obtain information about the financial affairs of plaintiffs was particularly damaging with respect to the leveraging of the Accounts.

Initially the Accounts were approximately $240,000 under defendant's minimum account requirement. Mr. Anderson undertook to raise that amount by borrowing, and Mr. Chase was fully aware of Mr. Anderson's efforts. (28a). Three types of borrowing were used -- increased bank debt, real estate mortgages, and resort to brokerage margin. In mid-1967 over $200,000 was raised in this fashion, and as a result, well over one-half of the Accounts was derived from borrowings. (The amounts and percentages of borrowings are discussed in Exhibit B to this brief). This leveraging made it essential that market movements be watched constantly.

When a market decline occurred in late 1967 Mr. Spindler failed to recommend a program of sales for the Accounts, apparently overlooking the highly leveraged position. Even after Mr. Anderson pointed this out, Mr. Spindler suggested prospective sales only reluctantly. (Pl. Exh. 62). At trial Mr. Chase emphasized the inappropriateness of extensive leveraging (186a-187a), although in view of Mr. Spindler's reluctance to recommend sales, it must be concluded that he and Mr. Chase disagreed on this subject in late 1967.

Now, in an effort to excuse its failure to counsel with respect to the leveraging in the Accounts (which its minimum account requirement had induced), defendant claims that it did not know of the leveraging: "I didn't know where the money was coming from, whether it was mortgage money, whether it was borrowed from this source or another." (Mr. Chase, 187a). Although plaintiffs believe this statement to be false, it constitutes a clear admission that Chase Inc. negligently failed to carry out its duty of compiling and updating all financial information regarding the Accounts.

Defendant's other excuse regarding the leveraging is that it told Mr. Anderson to close the margin accounts. (198a-199a). This is equally disingenuous. First, the primary purpose of the margin accounts was to get the Accounts

up to the minimum size required by defendant; and second, the margin accounts remained in use literally for years during the 1966-1971 period and defendant never exercised its right of termination.*

(2) Defendant did not determine, analyze review, or centrally record the objectives of the Accounts, and apparently it had no procedure for doing so. This deficiency is illustrated most strikingly by the account divider pages in defendant's "black book". (491a; 498a). These pages purport to be a ready-reference source for the objectives of the Accounts. As described on these pages the objectives of the Accounts include leveraging and short-selling, two types of investment activity of which defendant now claims it disapproved. Yet in more than four years of alleged supervision these pages were defendant's only guide to the objectives of the Accounts, and no effort was made to correct, amend, or review either the objectives or the divider pages. (TT 214).

Referring to the divider-page notations, the district court concluded that "there is no question as

---

* "Speculation, manipulation, faulty credit control, investors' ignorance, and disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web." H. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934).

to the propriety of these objectives". (626a). Yet "leveraging and short-selling" are included in the noted objectives, and a major theme of the court's decision is the purported impropriety of these investment vehicles. The two conclusions are irreconcilable.

Defendant's system purported to have a back-up record of the Accounts' objectives, on a so-called "bible sheet". However, at trial defendant's representatives could not agree on what or where the bible sheet was. (TT 218; 292a). The document which was produced, and which might be the illusive bible sheet, has only the words "Douglas S.H. Anderson" in the space provided for "primary account objective" (Pl. Exh. 46), and nowhere else on the document is there any recitation of the objectives of the Accounts.

The materiality and importance of analyzing and reviewing the Accounts' objectives is admitted: "...one of the first things that we try to determine is exactly what the investment objectives of the individual are,..." (Mr. Chase; 175a). Yet in this case it was not done.

(3) Defendant had no accurate procedure for evaluating the tax impact of prospective transactions in the Accounts.

A separate card was maintained for each security held by the Accounts, and on the card was a place to fill-in "federal cost". However, on certain cards this

space was blank; on others the average cost was filled-in. (518a-529a). In either case the cards did not accurately reflect plaintiffs' true federal income tax bases in the securities.

In addition, even if defendant had maintained accurate basis information, it could not have assessed the tax impact of a proposed transaction because it did not maintain accurate information on other capital gains and losses realized by plaintiffs in the same tax period. Anderson Co. had a tax year ending on April 30. Ignoring this, defendant kept tax information for the Anderson Co. account on a calendar year basis. (515a-517a). The "$117,000" entry on defendant's tax records for Anderson Co. is illustrative.(515a). Mr. Inches could not determine from Chase Inc. records what event triggered that entry, nor the date of the event. (TT 424-426). In fact, the date of the event was recorded incorrectly as April 30, 1970, the last day of the Anderson Co.'s 1970 fiscal year, when it actually happened in fiscal 1971 (i.e., in July, 1970). (120a; 128a).

Defendant **never requested** or obtained copies of the tax returns of the plaintiffs.

Defendant's inability to counsel the Accounts with respect to tax aspects of proposed transactions was as much a matter of willful intent as it was deficien-

cies in the system. Mr. Chase stated:

> A. ...You must remember, we didn't even know what the tax position was of the Anderson Company, and we didn't want to make that our business. We were not running the Anderson Company, we were only running the Anderson Company securities account.
>
> Q. Why was it that you didn't know the tax position of the Anderson Company?
>
> A. That was not our responsibility, to know that. Under the basic agreement, the client is supposed to keep us advised of all pertinent matters relating to the securities that he turns over to us, and any changes that take place in the client's position, we look to the client to let us know. (254a).

(4) Defendant's procedure for keeping track of cash available for investment was deficient, in several respects. For instance, at the conclusion of every four-months appraisal period defendant made a fictitious (so-called "bookkeeping") entry on the cash balance record. This entry was designed to, and did, change the recited balance to zero. (290a-291a; 348a-349a). For example, the cash balance record of Anderson Co. showed $40,332.18 available for investment on February 6, 1970. As of the date, Mr. Inches caused a negative entry of $40,332.18 to be made on the record, thus making the balance zero. Therefore, during the ensuing period defendant operated with cash balance information which was totally fictional and inaccurate. (513a).

It appears that in 1969 and 1970 the total of the fictional "bookkeeping" entries regarding Anderson Co. was as high as $178,441. This was a material distortion. Mr. Inches tried to explain this away by saying that after the appraisal dates these entries were reversed and the true cash balances "reinstated". (352a-354a). With the exception of November 1970, this is utterly untrue, as an examination of the "cash balance" records regarding Anderson Co. demonstrates. (511a-514a).

In finding that this criticism of the cash balance records "seems exaggerated", the district court appears to again have concluded that plaintiffs were obligated contractually to submit information about cash availability and without such information defendant's cash balance records were meaningless anyway. (629a-630a). Thus the district court acknowledged another deficiency in defendant's services, but disregarded it by erroneously charging plaintiffs with defendant's duties.*

* Defendant's cash balance records began with a zero balance, which also was incorrect. (See testimony of Mr. Anderson; TT 432-435; Pl. Exh. 69). The district court erroneously found that the zero opening balances were correct.

Similarly, the district court found that defendant's complete discontinuance of the cash balance reco[illegible] of November 17, 1970, was excusable because there were no transactions in December, 1970, and January, 1971. (630a). However, that is not the true explanation because there were transactions in November, 1970, which were not recorded (Pl. Exh. 48), and Mr. Inches admitted that he could not explain discontinuance of the record-keeping. (348a).

(5) Defendant's senior officers did not understand the meaning or significance of "investment supervisory services". Of all deficiencies in this area this is the most glaring. (174a-177a; 291a-292a). Mr. Spindler, defendant's Vice-Chairman, testified that he did not know the meaning of the phrase and that he did not know of its legal significance under the Act. The pervasive inadequacy of defendant's procedures can be understood in light of this high-level ignorance.

The district court excused Mr. Spindler's ignorance, erroneously holding that it was not necessary to understand the meaning of investment supervisory services in order to counsel the Accounts. (630a-631a). To render supervisory services one must know what they are. In any event, the conversation in which Mr. Anderson was found to have waived plaintiffs' right to investment supervisory services allegedly occurred in late 1968, <u>after</u> the period of Mr. Spindler's responsibility for the Accounts.

(6) After February, 1968, defendant did not send to Mr. Anderson written memoranda of its purchase and sale recommendation orders. Indeed, in violation of SEC regulation, it ceased making any such memoranda. (93a-94a; 293a-294a). SEC regulation §275.204-2(a), 17 C.F.R. (1961), in relevant part, provides as follows:

> Every investment adviser...shall make and keep true, accurate and current

> the following books and records relating to his investment advisory business: ... (3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction...(7) Originals of all written communications rceived and copies of all written communications sent by such investment adviser relating to (i) any recommendation made or proposed to be made and any advice given or proposed to be given,....

The district court dismissed the regulation by concluding that it is inapplicable to oral recommendations. (632a). The purpose of the regulation is to make the adviser accountable for his acts, whether those acts be written or oral. Indeed the need for internal memoranda is greater when dealing with oral recommendations than when dealing with written recommendations, for in the latter case the recommendation itself may serve as a substitute for the memorandum.

(7) Defendant stopped analyzing and supervising the contents of the Accounts. It is most evident from a comparison of the securities in the Accounts with defendant's lists of approved securities. (Pl. Exhs. 45; 47-51). For example, of 22 securities in the Anderson Co. account on June 5, 1970, 10 were not included in defendant's lists, 8 were rated "3" or worse, and only 4 were rated "1" or "2".*

* "1" and "2" were purchase or hold ratings. "3" was permissible sale or hold; not purchase. "4" was permissible switch. "5" was sell. (Later "4" became sell.) If a security was not listed it was not followed by defendant and could be purchased only with Mr. Chase's permission. (634a).

Had defendant been supervising the Accounts, recommendations would have been made to sell the unlisted, low-rated, and unacceptable securities. No such recommendations were made. (126a).

It was represented to plaintiffs that defendant's evaluation of securities was founded upon a two-part "basic formula": (1) a security was not acceptable unless Chase Inc.'s estimate of the earnings growth rate exceeded fifteen percent per annum, and (2) a security was not acceptable unless such earnings growth rate exceeded the price-to-estimated-earnings ratio. (531a). Plaintiffs understood that no security would be recommended for the Accounts unless it satisfied both prerequisites, and in addition, that a sell recommendation would be made for any security in the Accounts which at any subsequent time failed to meet either prerequisite. (46a-47a). Although never disclosed to plaintiffs, securities which did not satisfy the formula were recommended by defendant, and an even greater number of securities remained in the Accounts, without a sell recommendation from defendant, long after they failed to satisfy the formula. The magnitude of defendant's disregard of its own "basic formula", with respect to the securities in the Accounts, is shown by Exhibit B to this brief. (Also see the explanatory notes to Exhibit B, which begin at page 3 of the exhibit.)

(8) The inadequacies of defendant's record-keeping are demonstrated by the "cash balance" records, securities "cross-index cards", tax records, and short-sale records, all of which were testified to and accepted in evidence. (286a-302a). The most serious record-keeping short-coming was demonstrated blatantly at trial by the testimony of Messrs. Chase, Spindler, and Inches; namely, the inability to determine what purchase or sale recommendations, if any, were made during any given period. (275a; 284a-285a; 303a). Had defendant continued to use its standard recommendation sheets it would have a record of all recommendations. These sheets remained in use for clients other than plaintiff. (209a).

(9) Defendant's recommendation wording became increasingly equivocal, to the point where it was impossible to determine whether particular statements were purchase or sale recommendations or general observations. The execution price and number of shares were not stated.

Originally the written forms had made these critical elements clear. Mr. Spindler's letter of November 9, 1967, points out that use of the "standard recommendation sheets" signified a formal Chase Inc. recommendation. (Pl. Exh. 62). Also, at trial Mr. Chase testified that a "specific" recommendation would be unequivocal. (212a-215a).

The district court acknowledged that defendant's

recommendations changed from specific (time of execution, price, and number of shares) to general (e.g., "there is no rush in selling" (475a)), but found the general recommendations acceptable. ([illegible]). Unbelievably, the court used the November 6, 1970, appraisal letter as an example of a "general", but useful, recommendation. This bears examination because the November 6 letter actually is a prime example of defendant's neglect. Not only were the recommendations in that letter general and useless, they were contradicted by defendant's next letter (482a). In the November 6 letter defendant opined that the investments in the Accounts were "attractive growth vehicles", an opinion which the district court found to be a useful recommendation to hold existing positions. Those positions may be summarized as follows: 9 hedged short positions; 9 naked short positions; and 5 long positions. (Pl. Exh. 48). In this litigation defendant claims that it consistently recommended covering all short positions; yet on November 6, 1970, it recommended, in a general but purportedly useful way, that 18 short positions be retained. If no such recommendation was intended, it must be concluded that the letter was vague and useless -- hardly an appropriate document for the district court to select as a model of clarity.

Even more erroneous is the district court's companion finding that defendant was not obligated to make,

or take responsibility for, specific recommendations because it did not know the "source of the funds or what the outstanding obligations of the accounts might be". (638a-639a). In other words the court retroactively relieved defendant of its counselling obligations because defendant failed to seek out information admittedly essential to performance of those obligations.

D. The district court's finding of waiver. Thus the district court repeatedly overlooked deficiencies in the services rendered to the Accounts because it found that Mr. Anderson had consented to acceptance of less than the required minimum. As discussed above, no such consent was given. There was absolutely no reason for Mr. Anderson to do so. He was an interested party who gave thought to every recommendation. He often responded with questions or suggestions before deciding upon a particular transaction. (66a-67a). His desire constantly was for more attention to the Accounts; never less. Shortly before Mr. Anderson allegedly agreed to lessened services defendant had raised the minimum fee on the Accounts. (438a).

In any event, the alleged consent, if given, would have been illegal and ineffective. Section 215 of the Act (15 U.S.C. §80b-15 (1940)) provides, in relevant part:

> (a) Any condition, stipulation, or provision binding any person to waive compliance

> with any provision of this title or with any rule, regulation, or order thereunder shall be void.
>
> (b) Every contract in violation of any provision of this title and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this title, or any rule, regulation, or order thereunder, shall be void...

There are similar provisions in the other federal securities laws, and they are consistently construed to protect the public investor from waiving valuable rights granted by the statutes and regulations. Securities Act of 1933, §14; 15 U.S.C. §77n(1933); Securities Exchange Act of 1934, §29; 15 U.S.C. §78cc (1934).

The declaration of policy in the bill which ultimately became the Act stated, in part:

> ...it is hereby declared that the national public interest and the interest of investors are adversely affected... (4) when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisors to relieve themselves of their fiduciary obligations to their clients. Hearings before Subcommittee of the Committee on Banking and Currency; S.3580, 76th Cong., 3d Sess. 30 (emphasis added).

The Act does not mandate that every investment

adviser render investment supervisory services to every client. The district court correctly so held. (618a). However, once an adviser undertakes to render such services to a particular client, the Act does mandate that he fulfil his undertaking. In concluding that defendant did not undertake supervision of the Accounts, the district court erred. (620a).

The evidence of defendant's undertaking is extensive. First, the contract between the parties expressly obligates defendant to "analyze and supervise" the accounts. (385a). Second, defendant's promotional brochure emphasizes that rendition of supervisory services is its exclusive business. (366a-376a). Third, in his initial conversation with Mr. Anderson, Mr. Chase described defendant's services as exclusively supervisory. (46a-47a). Fourth, defendant's "ADV" filing with the SEC in effect during the relevant period stated that defendant rendered investment supervisory services to all of its clients.* (486a-490a). Fifth, the same form of contract as was signed by plaintiffs was annexed to defendant's "ADV"

---

* The filing of (or failure to amend) a false form "ADV" is unlawful. Act, §207; 15 U.S.C. §80b-7 (1940). The district court bypassed the falsity of defendant's "ADV" by saying that the SEC might take some action with respect to it, but it was immaterial to this case. (620a).

filing as a model of the contract under which it allegedly rendered supervisory services to its clientele. (487a). Sixth, every invoice rendered by defendant to plaintiffs described the alleged services as "investment counsel" services, a term synonymous with investment supervisory services. Seventh, Mr. Inches, defendant's employee, admitted defendant's undertaking to supervise, counsel, and manage the Accounts. (See Point IV and the consolidated appeal). Eighth, defendant's answer admits that it commenced "counselling" and charged for such services. (14a-16a).

Thus defendant's undertaking to supervise the Accounts was proved, and in the face of that proof there is no sufficient evidence that plaintiffs subsequently waived the undertaking. Two bits of testimony purportedly support the waiver conclusion. The first was by Mr. Chase, describing a conversation between Mr. Inches and Mr. Anderson which allegedly occurred in early 1969. Mr. Chase was not a party to the conversation.

> Each of the two gentlemen, Mr. Anderson and Mr. Inches, said they had had a meeting of minds and I therefore said, "All right, we will try it on that basis," and it was within that context that it was agreed at that time that recommendations which normally in our accounts are made in any one of three ways, namely, in writing, by telephone or by personal contact --

> it was agreed at that juncture that the recommendations in writing would not constitute a part of the service, that what Mr. Anderson apparently wanted was verbal and personal contact with Mr. Inches in order to get the benefit of our policy committee's basic investment policies, our research department's findings and our securities selection committee's material. This didn't mean that he was entitled to receive all of this information, far from it, but he was entitled to ask questions and to the extent that we had covered the stocks that he was asking questions on, we would be glad to give him that information and, in addition, we would give him recommendations of particular stocks that we thought were attractive at any given time, and we would give him in our regular reports our thinking with respect to the economic and stock market outlook. (211a-212a).

The second bit of testimony was by Mr. Inches, describing the same alleged conversation:

> ...we discussed the accounts in general as to what he wanted to receive from Chase within the framework of the John P. Chase organization, and we basically agreed, with his consent, that we follow a system of phone calls and face-to-face communication. He was largely interested in a flow of ideas from John P. Chase. (321a).

This testimony, at most, suggests a procedural alteration in the counselling relationship, that is, a change in

emphasis from written to oral communication.* It does not support the district court's conclusion that Mr. Anderson waived plaintiffs' rights to receive investment supervisory services.** From this limited, contradicted testimony the district court erroneously constructed a waiver of grand proportions, which it employed time and again as an all-purpose excuse for serious breaches of defendant's fiduciary duties.

E. Fraud and negligence. Defendant's acts and omissions also constitute fraud within the meaning of §206 of the Act. The ingredients of that fraud are defendant's false representations that it would act, and was acting, as "investment counsel" to the Accounts; defendant's failure to inform plaintiffs at the beginning of 1969 that it had terminated its supervisory services to the Accounts; and defendant's practices and course of business, which were deceptive in that they purported to be "supervisory", as plaintiffs were led to believe, when in fact they were barely "adivsory".

However, a fraud conclusion is not essential to a judgment for plaintiffs. Defendant's breach of its

---

* Of course the SEC regulation requiring that defendant maintain internal memoranda of orders could not be waived. SEC Regulation §275-204-(2), 17 C.F.R. (1961).

** Mr. Anderson has no recollection of even the limited procedural alteration testified to by defendant. (100a).

contractual and statutory fiduciary duty alone entitles plaintiffs to a judgment for the full amount of their actual damages.

It also may be that a violation of §10(b) of the Securities Exchange Act of 1934 has been proved. In O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964), a §10(b) case, the court said:

> We do not now consider the situation in which the fiduciary duty allegedly breached has been created with particular reference to the purchase or sale of securities. Violation of the duty owed by a securities broker or dealer or by an investment adviser, even though not involving deception, may well be the kind of "fraudulent practice usually associated with the sale or purchase of securities." (pp. 768-769).

However, it is not necessary to proliferate the number of statutes violated. Whether by misrepresentations, non-disclosures, or fraudulent practices, and whether under the Investment Advisers Act or the 1934 Act, defendant is liable to plaintiffs.

The same is true of the count founded on negligence. Defendant's breaches of its fiduciary duty also constitute actionable common law negligence, but such a conclusion is not essential to a judgment for plaintiff.

POINT III

THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE OF DEFENDANT'S NON-DISCLOSURE OF POSSIBLE CONFLICT BETWEEN ITS MUTUAL FUND TRANSACTIONS AND PLAINTIFFS' TRANSACTIONS

Throughout the period that defendant acted as investment counsellor for plaintiffs it also managed a group of mutual funds. Defendant admits that a large purchase or sale of securities by a mutual fund may affect the market price of the security. (224a-225a). Therefore if defendant recommended to plaintiffs that they purchase a security, and at the same time, or shortly before, caused a mutual fund to purchase the same security, the price paid by plaintiffs might be higher as a result of the mutual fund purchase. Conversely, contemporaneous sales might result in a lower selling price for plaintiffs.

Defendant could not satisfy its high fiduciary duty as plaintiffs' counsellor unless it had an effective system for avoiding the conflict inherent in contemporaneous transactions by individual accounts and the mutual funds. Pre-trial discovery, although limited in this area by rulings of the district court, suggested that defendant was cognizant of the inherent conflict, but had inadequate preventative procedures, and no procedure for disclosure to plaintiffs

of potentially contemporaneous transactions. At trial plaintiff sought to prove these procedural deficiencies in two ways -- by examination of Mr. Chase, and by public reports of the mutual funds showing transactions potentially contemporaneous with transactions by plaintiff.* The district court excluded both. (224a-227a; 265a-268a). The basis of the court's evidentiary ruling was lack of relevance, and apparently an unwillingness to try "several lawsuits" at once. (267a).

The exemplary evidentiary offer made by plaintiffs related to Ampex Corp. Between February 1 and April 30, 1967, one of the Chase mutual funds sold 5,000 shares of that stock, at defendant's direction. (265a). On February 17, 1967, defendant also recommended the sale of 150 shares of Ampex Corp. then owned by Mrs. Anderson. (266a).** The potential conflict thus was shown to have been real.

Despite the district court's rulings there is evidence that defendant did not prevent potential conflicts, or disclose them to plaintiffs, and this is further indication of defendant's inability and unwillingness to render

---

* Plaintiffs did not offer evidence of the exact dates, amounts, and prices of mutual fund transactions because that information is not public, and the district court denied plaintiffs' pre-trial request for discovery.

** Several other examples could have been offered but plaintiffs' counsel felt it would be cumulative and unnecessarily time consuming in view of the district court's clear exclusionary ruling.

investment supervisory services. However, the impropriety runs deeper, for if actual conflicts occurred during the period of the counselling relationship plaintiffs may have sustained direct damage. This can be determined only after detailed discovery of mutual fund transactions (by date, time, amount, and price) and comparison of that information with transactions in the Accounts and market price movements. This the district court prohibited, erroneously.

POINT IV

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' POST-TRIAL MOTION FOR A LIMITED REHEARING

In designating the appendix for the main appeal in this action plaintiffs' counsel realized for the first time that they had not offered at trial a highly relevant portion of a pre-trial deposition of Mr. Inches, the employee of defendant responsible for management of the Accounts in 1969, 1970, and 1971. Plaintiffs therefore moved in the district court for a rehearing for the limited purpose of adding to the record the omitted deposition segment, as well as for amendment of the decision if the district court felt it appropriate. (653a-683a). The motion was denied, on the grounds that there had been an opportunity to offer the evidence at trial and the evidence "would not have a material bearing". (684a).

The proffered portion of Mr. Inches deposition is highly significant and therefore should have been accepted by the district court. The keystone of the decision below is a finding that plaintiffs agreed to accept from defendant something less than investment supervisory services; that is, consented to defendant acting as a passive consultant, or "adviser", rather than as a "counsellor". Based on that finding the district court concluded that defendant was not

obligated to seek out background information regarding plaintiffs, was not obligated to initiate purchase recommendations, was not obligated to recommend sale of securities held by the Accounts which were unacceptable by defendant's standards, was not obligated to consider the tax implications of prospective transactions, was not obligated to make written memoranda of recommendations, and so on.

The following trial testimony of Mr. Inches is the evidence which purportedly supports the finding that plaintiffs waived their right to full counselling services:*

Q. Did the meeting that you discussed in this telephone conversation come about?

A. How did it come about?

A. Did it come about.

A. Yes.

Q. When did it occur?

A. In late 1968.

Q. Do you know what month it occurred?

A. I can't say for sure.

Q. Could it have been October?

A. I don't believe so.

Q. Are you sure it has not in 1969?

---

* Mr. Chase also testified about this purported agreement, but he admittedly was not party to the alleged conversation between Mr. Inches and Mr. Anderson. (210a-216a). Mr. Anderson denied recollection of any such conversation. (100a).

A. I am not certain.

Q. It could have been in 1969?

A. I believe it was in 1968.

Q. Where did this meeting take place?

A. In my office at John P. Chase.

Q. In Boston?

A. In Boston.

Q. Who was present at that meeting?

A. Mr. Anderson and myself.

Q. What was said and by whom?

A. We discussed the accounts at length, we went into the short positions that I had understood he had had, and we discussed the accounts in general as to what he wanted to receive from Chase within the framework of the John P. Chase organization, and we basically agreed, with his consent, that we follow a system of phone calls and face-to-face communication. He was largely interested in a flow of ideas from John P. Chase.

Q. Can you recall anything else being said at that time?

A. I specifically had told Mr. Anderson that we would not recommend any short positions in the account, or other types of hedged operations.

Q. Anything else?

A. That's it.

Q. Do you recall Mr. Anderson saying anything to you?

A. Mr. Anderson agreed that the program as established at the meeting would be entirely acceptable to him. I told him I would check with Mr. Chase and make sure we were in the proper path (320a-322a).

In light of defendant's continuing representations that it was rendering "investment counsel" services (particularly in its invoices to plaintiffs) and its failure to seek alteration of the written contract which required defendant to "analyze and supervise" the Accounts, this testimony is flimsy support for a finding of waiver. However, the insufficiency of this testimony is best demonstrated by comparing it to Mr. Inches' pre-trial testimony. For instance,

> ...I think, in earlier testimony, that I completely identified exactly what my duty would be at John P. Chase towards the <u>counsel</u> of the three accounts, the two in question here, the exact parameters. (emphasis added) (660a).
>
> * * *
>
> ...We were <u>counseling</u> the Alice E. Anderson account and The Anderson Company and the trust account, and Mr. Anderson told me at the early luncheons that we were responsible for the <u>management</u> of funds that were placed in these accounts, some of which may have come from the

company at one time or another. (emphasis added) (660a).

* * *

...He gave me pretty much free mandate to run this as a regular John P. Chase counsel account.... (670a).

* * *

...But the main thing I wanted to receive, which I think is terribly important from our point of view, is did we have a reasonably free latitude of the funds which we had under our management, which he [Mr. Anderson] said we did. (672a).

* * *

I was satisfied and apparently my previous counselors in the account, my office was satisfied, that this account would fit into our scheme of things. (672a).

Thus Mr. Inches pre-trial testimony demonstrates the absence of any waiver of the counselling obligation. Rehearing should have been granted, the testimony should have been considered, and the finding of waiver should have been withdrawn.

CONCLUSION

The district court erred in its definition of the fiduciary duty owed by defendant to plaintiffs; in its finding that plaintiffs had waived their right to full counselling services; in its conlusion that such a waiver, if made, would be effective; in its failure to permit discovery or introduction of evidence showing non-disclosure of potentially conflicting transactions; and in its post-trial refusal to consider a segment of Mr. Inches' pre-trial deposition.

Despite the length of this brief and the factual detail of the trial record, the primary issue before this court is waiver. Plaintiffs proved that defendant agreed to render (and represented that it would render) supervisory services to the Accounts. The district court held that supervisory services were not rendered in important respects. Nevertheless, the court decided the case for defendant, holding that defendant had been relieved of its supervisory obligations by a waiver agreement reached with Mr. Anderson. This was erroneous, on two levels. First, such a waiver would be ineffective. Second, no such waiver occurred. The supporting testimony, even if believed, does not describe the general, sweeping waiver found by the district court, and more importantly, that testimony is contradicted by

every document relevant to the question, and by Mr. Inches' pre-trial testimony.

Plaintiffs-appellants respectfully request that the denial of the motion for rehearing be reversed, and that the judgment dismissing the complaint be reversed. It further is requested that the action be remanded for assessment of damages.

Respectfully submitted,

SCHWENKE & DEVINE
Attorneys for Plaintiffs

Of Counsel:

Michael C. Devine
David M. Butowsky
(Gordon Hurwitz
Butowsky & Baker)

EXHIBIT A, pg. 1

SUBCHAPTER II.—INVESTMENT ADVISERS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 78c, 78o, 80a-49 of this title.

§ 80b-1. Findings.

Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 79z-4 of this title, and facts otherwise disclosed and ascertained, it is found that investment advisers are of national concern, in that, among other things—

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and

(3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.

(Aug. 22, 1940, ch. 686, title II, § 201, 54 Stat. 847.)

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Securities and Exchange Commission were, with certain exceptions, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 10, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3175, 64 Stat. 1265, set out as a note under section 78d of this title.

CROSS REFERENCES

Findings and declaration of policy under Investment Company Act of 1940, see section 80a-1 of this title.

Necessity for control of holding companies, see section 79a of this title.

Necessity for regulation under—

Securities Exchange Act of 1934, see section 78b of this title.

Trust Indenture Act of 1939, see section 77bbb of this title.

§ 80b-2. Definitions.

(a) When used in this subchapter, unless the context otherwise requires—

(1) "Assignment" includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but if the investment adviser is a partnership, no assignment of an investment advisory contract shall be deemed to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(2) "Bank" means (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this subchapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(3) "Broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.

(4) "Commission" means the Securities and Exchange Commission.

(5) "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in bankruptcy, or similar official, or any liquidating agent for any of the foregoing, in his capacity as such.

(6) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(7) "Dealer" means any person regularly engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, insurance company, or investment company, or any person insofar as he is engaged in investing, reinvesting or trading in securities, or in owning or holding securities, for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

(8) "Director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(9) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(10) "Interstate commerce" means trade, commerce, transportation, or communication among

EXHIBIT A, pg. 2

the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 78c (a) (12) of this title, as exempted securities for the purposes of the Securities Exchange Act of 1934; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

(12) "Investment company", affiliated person, and "insurance company" have the same meanings as in the Investment Company Act of 1940. "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

(13) "Investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client.

(14) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(15) "National securities exchange" means an exchange registered under section 78f of this title.

(16) "Person" means a natural person or a company.

(17) The term "person associated with an investment adviser" means any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, except that for the purposes of section 80b-3 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the meaning of such term. The Commission may by rules and regulations classify, for the purposes of any portion of portions of this subchapter, persons, including employees controlled by an investment adviser.

(18) "Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase any of the foregoing.

(19) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Canal Zone, the Virgin Islands, or any other possession of the United States.

(20) "Underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(21) "Securities Act of 1933", "Securities Exchange Act of 1934", "Public Utility Holding Company Act of 1935", and "Trust Indenture Act of 1939", mean those Acts, respectively, as heretofore or hereafter amended.

(b) No provision in this subchapter shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. (Aug. 22, 1940, ch. 686, title II, § 202, 54 Stat. 847; Proc. No. 2695, eff. July 4, 1946, 11 F. R. 7517, 60 Stat. 1352; June 25, 1959, Pub. L. 86-70, § 12(c), 73 Stat. 143; July 12, 1960, Pub. L. 86-624, § 7(d), 74 Stat. 412; Sept. 13, 1960, Pub. L. 86-750, § 1, 74 Stat. 885; July 1, 1966, Pub. L. 89-485, § 13(j), 80 Stat. 243; Dec. 14, 1970, Pub. L. 91-547, § 23, 84 Stat. 1430.)

References in Text

The Bank Holding Company Act of 1956, referred to in subsec. (a)(11)(A), is classified to section 1841 et seq. of Title 12, Banks and Bankings, and sections 1101-1103 of Title 26, Internal Revenue Code. The term "bank holding company" is defined in section 1841(a) of Title 12.

EXHIBIT A, pg. 3

investment performance of the company or fund over a specified period in relation to the investment record of an appropriate index of securities prices or such other measure of investment performance as the Commission by rule, regulation, or order may specify. For purposes of clause (B) of the preceding sentence, the point from which increases and decreases in compensation are measured shall be the fee which is paid or earned when the investment performance of such company or fund is equivalent to that of the index or other measure of performance, and an index of securities prices shall be deemed appropriate unless the Commission by order shall determine otherwise. As used in paragraphs (2) and (3) of this section, "investment advisory contract" means any contract or agreement whereby a person agrees to act as investment adviser or to manage any investment or trading account of another person other than an investment company registered under subchapter I of this chapter. (Aug. 22, 1940, ch. 686, title II, § 205, 54 Stat. 852; Sept. 13, 1960, Pub. L. 86-750, § 7, 74 Stat. 887; Dec. 14, 1970, Pub. L. 91-547, § 25, 84 Stat. 1432.)

AMENDMENTS

1970—Pub. L. 91-547 substituted reference to section "80b-3(b)" for "80b-3" of this title in first sentence, redesignated as second sentence former third sentence, designating existing provisions as cl. (A) and adding cl. (B) and items (i) and (ii) and provision respecting compensation based on asset value of company or fund under management averaged over a specified period in relation to investment record of an index of securities or such other measure of investment performance specified by Commission rules, regulations, or orders, added third sentence provision respecting point from which compensation is to be measured, substituted in fourth, formerly third, sentence "paragraphs (2) and (3) of this section" for "this section and in definition of "investment advisory contract" the words "account of another person other than an investment company registered under subchapter I of this chapter" for "account for a person other than an investment company".

1960—Pub. L. 86-750 substituted "unless exempt from registration pursuant to" for "registered under."

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-547 effective upon expiration of one year after Dec. 14, 1970, see section 30(1) of Pub. L. 91-547, set out as a note under section 80a-2 of this title.

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Securities and Exchange Commission were, with certain exceptions, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 10, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3175, 64 Stat. 1265, set out as a note under section 78d of this title.

CROSS REFERENCES

Investment advisory and underwriting contracts, see section 80a-15 of this title.

§ 80b-6. Prohibited transactions by registered investment advisers.

It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction.

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

(Aug. 22, 1940, ch. 686, title II, § 206, 54 Stat. 852; Sept. 13, 1960, Pub. L. 86-750, §§ 8, 9, 74 Stat. 887.)

AMENDMENTS

1960—Pub. L. 86-750, § 8, deleted "registered under section 80b-3 of this title" from the introductory paragraph. Par. (4). Pub. L. 86-750, § 9, added par. (4).

§ 80b-6a. Exemptions.

The Commission, by rules and regulations, upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter. (Aug. 22, 1940, ch. 686, title II, § 206A, as added Dec. 14, 1970, Pub. L. 91-547, § 26, 84 Stat. 1433.)

EFFECTIVE DATE

Section effective Dec. 14, 1970, see section 30 of Pub. L. 91-547, set out as a note under section 80a-2 of this title.

§ 80b-7. Material misstatements.

It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 80b-3 or 80b-4 of this title, or willfully to omit to state in any such application or report any material fact which is required to be stated therein. (Aug. 22, 1940, ch. 686, title II, § 207, 54 Stat. 853.)

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Securities and Exchange Commission were, with certain exceptions, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 10, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3175, 64 Stat. 1265, set out as a note under section 78d of this title.

§ 80b-8. General prohibitions.

(a) It shall be unlawful for any person registered under section 80b-3 of this title to represent

EXHIBIT A, pg. 4

or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or any officer thereof.

(b) No provision of subsection (a) of this section shall be construed to prohibit a statement that a person is registered under this subchapter or under the Securities Exchange Act of 1934, if such statement is true in fact and if the effect of such registration is not misrepresented.

(c) It shall be unlawful for any person registered under section 80b-3 of this title to represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless (1) his or its principal business consists of acting as investment adviser, and (2) a substantial part of his or its business consists of rendering investment supervisory services.

(d) It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this subchapter or any rule or regulation thereunder. (Aug. 22, 1940, ch. 686, title II, § 208, 54 Stat. 853; Sept. 13, 1960, Pub. L. 86-750, §§ 10, 11, 74 Stat. 887.)

REFERENCES IN TEXT

The Securities Exchange Act of 1934, referred to in subsec. (b), is classified to section 78a et seq. of this title.

AMENDMENTS

1960—Pub. L. 86-750, § 10, substituted "General prohibitions" for "Unlawful representations" in the catchline.

Subsec. (c). Pub. L. 86-750, § 11(a), authorized representation as an investment counsel if person's principal business consisted of acting as investment adviser, and a substantial part of the business was rendering investment supervisory services, and deleted the requirements that the person be primarily engaged in rendering investment supervisory services, or that his registration application state that the person is, or is about to become, engaged primarily in rendering investment advisory services.

Subsec. (d). Pub. L. 86-750, § 11(b), added subsec. (d).

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Securities and Exchange Commission were, with certain exceptions, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 10, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3175, 64 Stat. 1265, set out as a note under section 78d of this title.

§ 80b-9. Enforcement of subchapter.

(a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person, it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or otherwise, as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances.

(b) For the purposes of any investigation or any proceeding under this subchapter, any member of the Commission or any officer thereof designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Repealed. Pub. L. 91-452, title II, § 216, Oct. 15, 1970, 84 Stat. 929.

(e) Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this

CROSS REFERENCES

Jurisdiction of offenses and suits under—
Investment Company Act of 1940, see section 80a–43 of this title.
Public Utility Holding Company Act of 1935, see section 79y of this title.
Securities Act of 1933, see section 77v of this title.
Securities Exchange Act of 1934, see section 78aa of this title.
Trust Indenture Act of 1939, see section 77vvv of this title.
Venue, see section 1391 et seq. of Title 28, Judiciary and Judicial Procedure.

FEDERAL RULES OF CIVIL PROCEDURE

Costs, see rule 54, Title 28, Appendix, Judiciary and Judicial Procedure.
Injunctions, see rule 65.
One form of action, see rule 2.
Process, see rule 4.

FEDERAL RULES OF CRIMINAL PROCEDURE

Continuation of section under rule 18, see note by Advisory Committee under rule 18, Title 18, Appendix, Crimes and Criminal Procedure.
Venue, see rules 18—22.

§ 80b–15. Validity of contracts.

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision. (Aug. 22, 1940, ch. 686, title II, § 215, 54 Stat. 856.)

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Securities and Exchange Commission were, with certain exceptions, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 10, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3175, 64 Stat. 1265, set out as a note under section 78d of this title.

§ 80b–16. Annual reports of Commission.

The Commission shall submit annually a report to the Congress covering the work of the Commission for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this subchapter as it may find advisable. (Aug. 22, 1940, ch. 686, title II, § 216, 54 Stat. 857.)

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Securities and Exchange Commission were, with certain exceptions, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 10, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3175, 64 Stat. 1265, set out as a note under section 78d of this title.

§ 80b–17. Penalties.

Any person who willfully violates any provision of this subchapter, or any rule, regulation, or order promulgated by the Commission under authority thereof, shall, upon conviction, be fined not more than $10,000, imprisoned for not more than two years, or both. (Aug. 22, 1940, ch. 686, title II, § 217, 54 Stat. 857; Sept. 13, 1960, Pub. L. 86–750, § 15, 74 Stat. 888.)

AMENDMENTS

1960—Pub. L. 86–750 inserted ", or any rule, regulation or order promulgated by the Commission under authority thereof,".

§ 80b–18. Officers and employees of Commission.

For the purposes of this subchapter, the Commission may, subject to the civil-service laws, appoint such attorneys, examiners, and other experts, and such other officers and employees as are necessary in the execution of the functions of the Commission and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of Title 5. (Aug. 22, 1940, ch. 686, title II, § 218, 54 Stat. 857; Oct. 28, 1949, ch. 782, title XI, § 1106 (a), 63 Stat. 972.)

REFERENCES IN TEXT

The civil-service laws, referred to in the text, are classified generally to Title 5, Government Organization and Employees.

CODIFICATION

Provisions which authorized the Commission to select, employ, and fix the compensation of such attorneys, examiners, and other experts without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States were omitted since the positions referred to are now in the classified civil service and subject to the applicable compensation schedules.

The authority for covering excepted positions into the classified civil service was given the President by section 2102 of Title 5, Government Organization and Employees.

For positions now covered by the Classification Act of 1949, see section 5101 et seq. of Title 5. For the power of the Civil Service Commission to determine the applicability of those sections to specific positions, see section 5103 of Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, struck out "Classification Act of 1923" and inserted in lieu thereof "Classification Act of 1949" which for purposes of codification has been translated as "chapter 51 and subchapter III of chapter 53 of Title 5".

TRANSFER OF FUNCTIONS

All executive and administrative functions of the Securities and Exchange Commission were, with certain exceptions, transferred to the Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by 1950 Reorg. Plan No. 10, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3175, 64 Stat. 1265, set out as a note under section 78d of this title.

§ 80b–18a. State control of investment advisers.

Nothing in this subchapter shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this subchapter or the rules and regulations thereunder. (Aug. 22, 1950, ch. 686, title II, § 222, as added Sept. 13, 1960, Pub. L. 86–750, § 16, 74 Stat. 888.)

§ 80b–19. Separability of provisions.

If any provision of this subchapter or the application of such provision to any person or circumstances

Date	Aggregate market value	Absent from Chase, Inc. internal lists of approved securities	By Chase Inc. standards unacceptable	acceptable	Cash and equivalent
10/6/66:	$ 61,407 (100%)	$ 61,407 (100%)	-0-	-0-	-0-
10/6/67:	$326,250 (100%)	$ 83,000 (25.5%)	$147,950 (45.3%)	$95,300 (29.2%)	-0-
10/4/68:	$247,050 (100%)	$128,250 (51.9%)	$ 68,400 (27.7%)	$50,400 (20.4%)	-0-
6/5/70:	$145,524 (100%)	$ 24,154 (16.6%)	$ 33,030 (22.7%)	$13,340 (9.2%)	$ 75,000 (51.5%)
7/31/70:	$229,442 (100%)	$ 5,281 (2.3%)	$ 15,231 (6.6%)	-0-	$208,930 (91.1%)
10/6/70:	$217,361 (100%)	$ 14,877 (6.8%)	$ 3,799 (1.7%)	-0-	$198,685 (91.5%)
2/5/71:	$207,951 (100%)	$ 1,171 (0.6%)	$ 4,983 (2.4%)	-0-	$201,797 (97.0%)

Date	Aggregate market value	Absent from Chase, Inc. internal lists of approved securities	By Chase Inc. standards unacceptable	acceptable	Cash and equivalent
10/6/66:	$102,165(100%)	$45,165(44.2%)	$10,950(10.7%)	$16,100(15.8%)	$29,950(29.3%)
10/6/67:	$109,755(100%)	$18,260(16.6%)	$79,395(72.4%)	$12,100(11.0%)	-0-
10/4/68:	$127,810(100%)	$39,000(30.5%)	$56,390(44.1%)	$32,420(25.4%)	-0-
6/5/70:	$ 48,270(100%)	-0-	$ 8,820(18.3%)	$ 4,450 (9.2%)	$35,000(72.5%)
7/31/70:	$ 77,661(100%)	-0-	$ 4,293 (5.5%)	-0-	$73,368(94.5%)
10/6/70:	$ 72,579(100%)	-0-	$ 4,700 (6.5%)	-0-	$67,879(93.5%)
2/5/71:	$ 73,295(100%)	-0-	$ 3,100 (4.2%)	-0-	$70,195(95.8%)

EXHIBIT B, pg. 3

Explanatory Notes

Exhibit B, page 1 shows the composition of the Anderson Co. account as of seven significant dates during the period that the counselling relationship was in effect. The composition is shown at market value (with percentages in parenthesis).*

Exhibit B, page 2 shows information in the same form for Mrs. Anderson's account.

The amounts are taken from defendant's appraisal sheets (492a-506a), with the exception of 7/31/70, which is based upon the 6/5/70 appraisals adjusted for subsequent events in June and July. In addition, the lines for 7/31/70, 10/6/70, and 2/5/71 are adjusted to reflect the cash available from hedged positions and the net losses or gains on naked short positions marked to the market; factors not taken into consideration on defendant's appraisals.

The first date, 10/6/66, is the "as of" date upon which defendant commenced counselling the Accounts, and the 2/5/71 date is the termination date. The obligations of the Accounts during this period (expressed as percentages of market value) can be illustrated as follows:

	Anderson Co.	Mrs. Anderson
10/6/67	73.5%	25.5%
10/4/68	66.7%	24.2%
6/5/70	99.7%	11.2%

The most significant information on Exhibit B is the low and constantly degenerating percentages of the Accounts invested in acceptable securities.

	Anderson Co.	Mrs. Anderson
10/6/67	29.2%	11.0%
10/4/68	20.4%	25.4%
6/5/70	9.2%	9.2%
7/31/70	0.0	0.0
10/6/70	0.0	0.0
2/5/71	0.0	0.0

* Comparable cost information is not shown because the lists which defendant submitted did not appraise cost.

SERVICE OF 2 COPIES OF THE WITHIN

Brief

IS HEREBY ADMITTED.

DATED:

Attorney for

STATE OF NEW YORK
COUNTY OF NEW YORK

DAVID BARRY being duly sworn deposes and says: On July 25th, 1975 I served the within ~~record on appeal~~ brief ~~appendix~~ on White & Case the attorneys for the ~~respondent~~ appellee by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 14 Wall Street New York, New York 10005

David Barry

Sworn to before me
this 25th day of
July, 1975

Lillian Weisberg

LILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1976